



ACCESSION TO WORLD INTELLECTUAL PROPERTY ORGANIZATION TREATIES

**A presentation to the Select Committee
on Trade and International Relations**

26 March 2019



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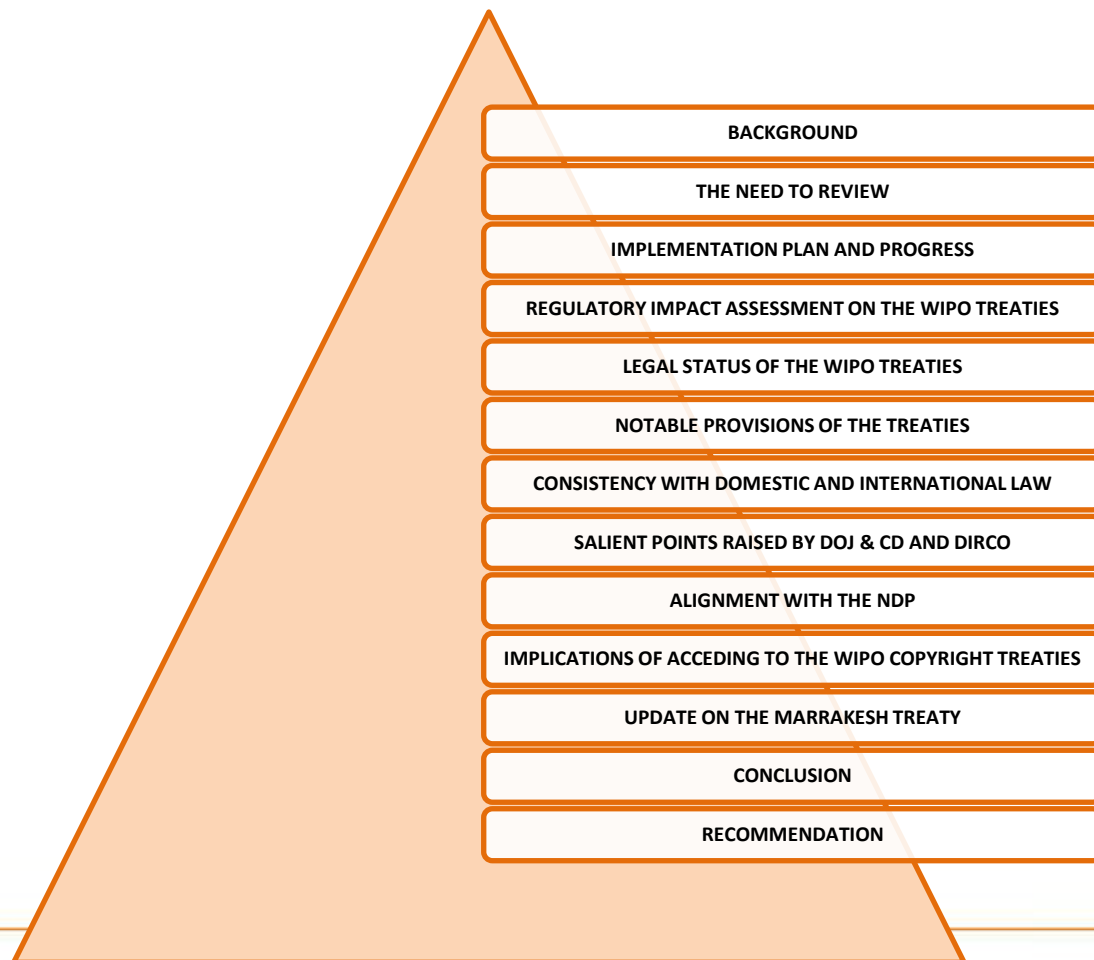
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PURPOSE

- To seek approval from the Select Committee on Trade and International Relations to accede to the World Intellectual Property Organization (WIPO) Treaties in terms of section 231 (2) of the Constitution of the Republic of South Africa which are as follows:
 - **Beijing Treaty on Audiovisual Performances (Beijing Treaty);**
 - **WIPO Performances and Phonographs Treaty (WPPT); and**
 - **WIPO Copyright Treaty (WCT).**
- To brief the Select Committee on **the progress made on the Marrakesh Treaty.**

TABLE OF CONTENTS



BACKGROUND
THE NEED TO REVIEW
IMPLEMENTATION PLAN AND PROGRESS
REGULATORY IMPACT ASSESSMENT ON THE WIPO TREATIES
LEGAL STATUS OF THE WIPO TREATIES
NOTABLE PROVISIONS OF THE TREATIES
CONSISTENCY WITH DOMESTIC AND INTERNATIONAL LAW
SALIENT POINTS RAISED BY DOJ & CD AND DIRCO
ALIGNMENT WITH THE NDP
IMPLICATIONS OF ACCEDED TO THE WIPO COPYRIGHT TREATIES
UPDATE ON THE MARRAKESH TREATY
CONCLUSION
RECOMMENDATION

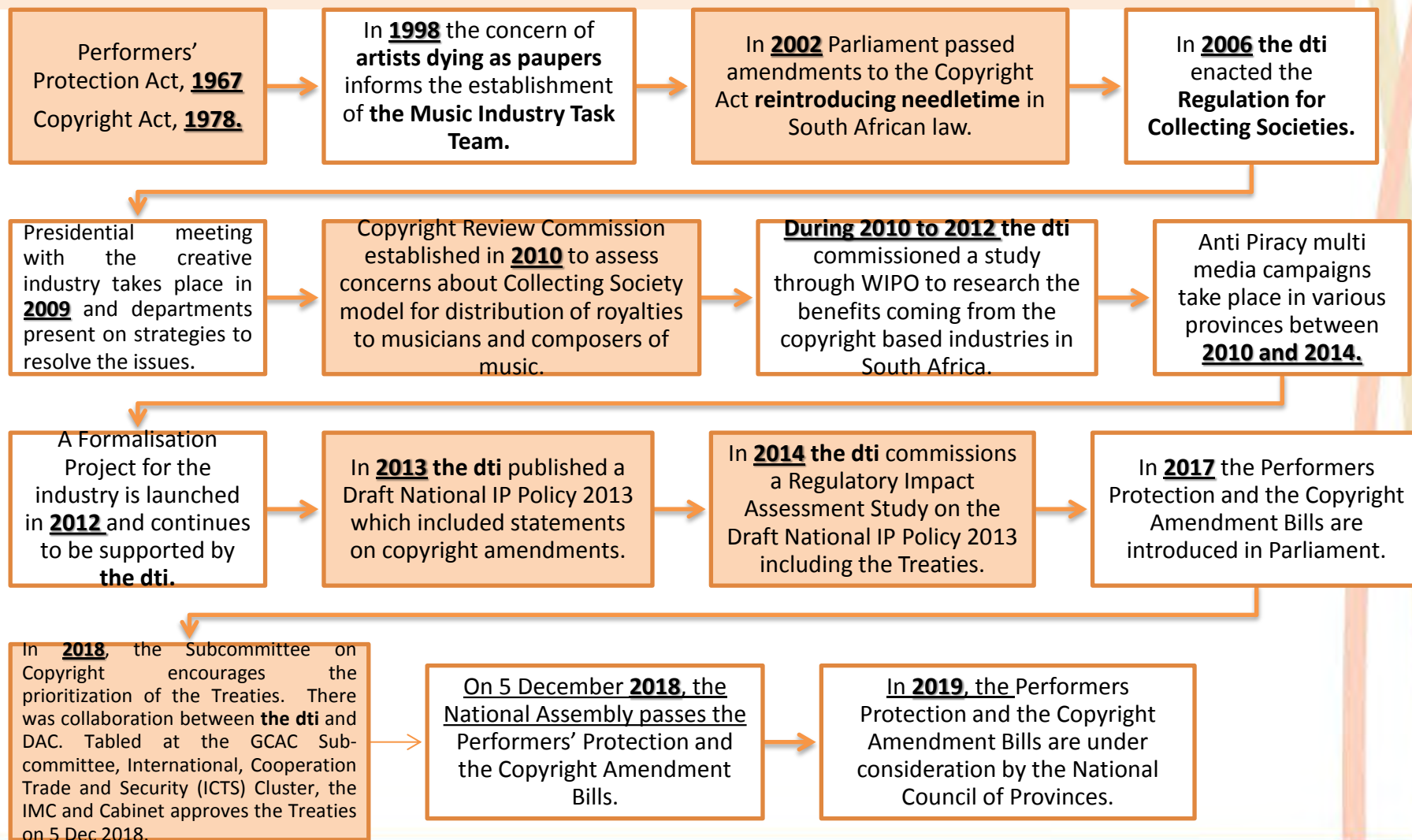


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BACKGROUND



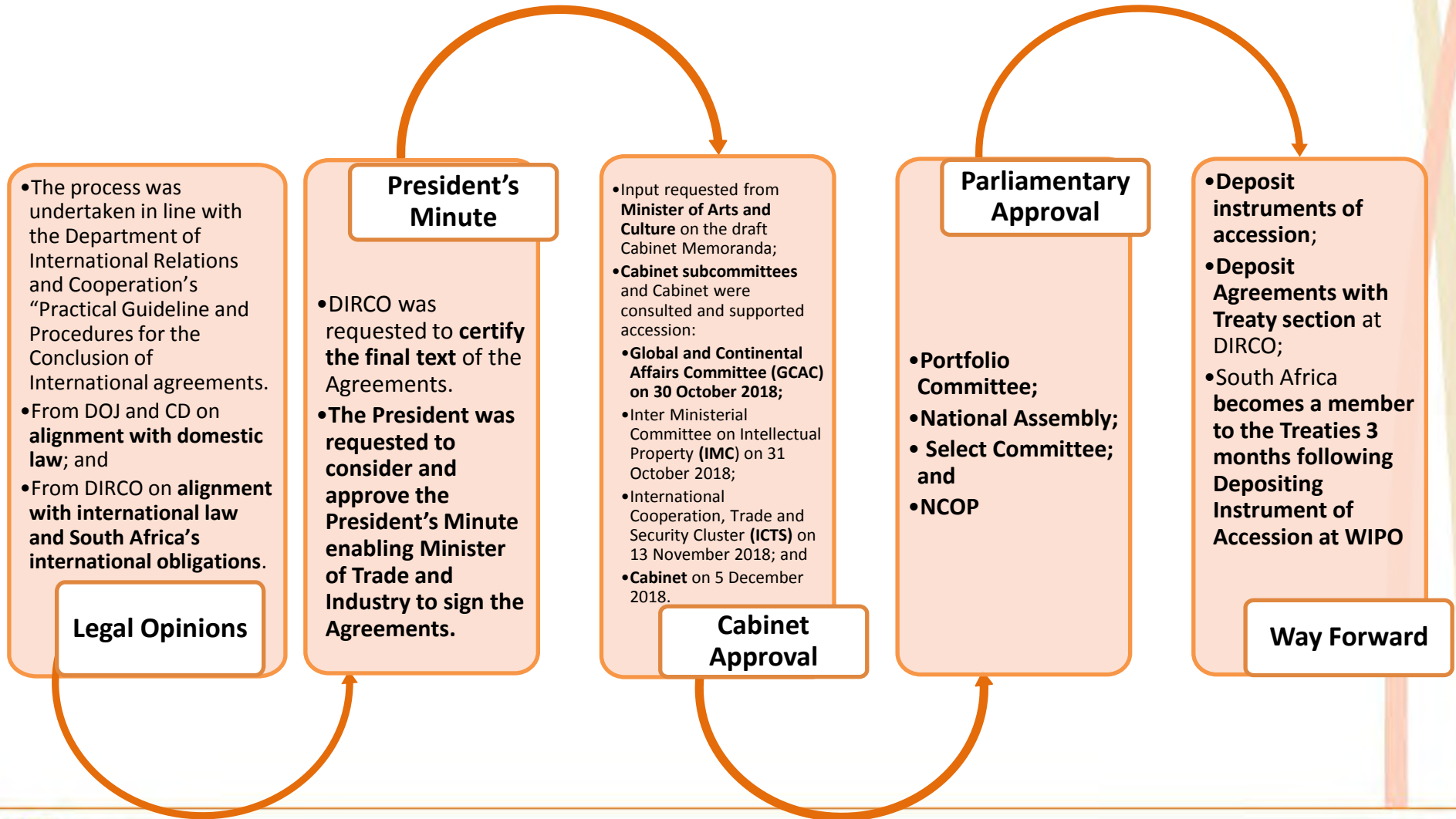
THE NEED TO REVIEW (CAB)

- **Address poor governance of Collecting Societies.**
- Enabling regulation of all collecting societies. Accreditation and mandate based collections.
- **Share of royalties** between authors and copyright owners.
- To ensure **agreements with foreign collecting societies.**
- Introduce exclusive “**right of communication to the public**” and the “**right of making available**” for copyright owners.
- Compulsory **keeping of cue sheets by music users** for ease of royalty collection.
- **Provide for Resale royalty rights** for artistic works.
- Unfair **contractual agreements** which compromises authors.
- **Strengthening moral rights** for performers
- Strengthening **Copyright Tribunal.**
- To provide for reasonable **limitations and exceptions** e.g. for research, education etc.
- To protect against **circumvention of technology protection measures.**
- **Access to copyright works including accessible formats for those with disabilities.**

THE NEED TO REVIEW (PPAB)

- Non-payment of repeat fees.
- Non-payment for commercial exploitation.
- Unfair contracts resulting in the perpetual signing away of their economic rights.
- The lack of updated industry contracts for freelance performers.
- Non-ratification of Treaties that make provision for the recognition of the moral and economic rights.
- Disputes not resolved speedily.
- The digital environment is not catered for in the Act wherein audiovisual content is consumed (Non-ratification of digital Treaties).

IMPLEMENTATION PLAN AND PROGRESS



REGULATORY IMPACT ASSESSMENT (RIA) ON THE WIPO TREATIES



An independent assessment on the Draft Intellectual Property Policy (published for public comments in September 2013), was undertaken in 2014. One of the critical policy themes the RIA assessed was the amendment of various legislation to implement the contents of international treaties.

BENEFITS OF THE WIPO TREATIES

- Beijing Treaty will attract more people coming into the creative industry, especially showcase industry, promote the development of related industries and enhance the level of national economy development.
- Authors and Performers would enjoy the **right to benefit from exploitation of works on the Internet.**
- Collection societies will be able to conclude **license agreements for the digital exploitation of work and online exploitation.** This will result in an **increase in revenue base** for rights holders.
- The positive outcome would be the **stimulation of South African cultural and creative industries.**

BENEFITS OF THE WIPO TREATIES

- The Beijing Treaty incorporates performers of "literary folk art expression" in its scope of protection. This is a great opportunity for South Africa to expand the protection of traditional expressions.
- TPMs would be applicable to copyright works.
- Appropriate **exceptions and limitations** for digital uses would be adopted.
- Adopting appropriate exceptions and limitations will result in **legal certainty for users on permitted uses of works**.

LEGAL STATUS OF THE WIPO TREATIES



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THE WIPO TREATIES

- **The Beijing Treaty** deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member.
- **WPPT** deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds) South Africa is not a member.
- **WCT** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member.

STATUS OF THE WIPO TREATIES

Beijing Treaty

- Adopted on 24 June 2012 in Beijing.
- Not yet in force.

WPPT

- Adopted on 20 December 1996 in Geneva.
- Came into force on 6 March 2002.

WCT

- Adopted on 20 December 1996 in Geneva.
- Came into force on 20 May 2002.

SIGNATURE AND ACCESSION/ RATIFICATION TO DATE

74/191 member states signed (indicates an intention to ratify in future and creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the Beijing Treaty.

- **24/191 member states ratified/ acceded** to date including Nigeria; Algeria; Botswana; Burkina Faso; Chile; China; Japan; Russian Federation and Mali.

Beijing Treaty



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- **51/191 member states signed** including **South Africa signed on 12 December 1997.**
- A copy of the Presidential Minute authorising such signature could not be located. Based on this, DIRCO advised that the signature should be disregarded internally and South Africa must express its interest to be bound by way of an Instrument of Accession rather than an Instrument of Ratification. Accession and ratification have the same legal effect of binding South Africa to the terms of the WPPT.
- **99/191 member states ratified / acceded** to date including Canada; European Union; France; Germany; Kenya; Mexico; Namibia; Nigeria and United States of America.

WPPT AND WCT



ACCEDING TO THE BEIJING TREATY WHILST NOT YET IN FORCE

Thus far **24 countries** have ratified/ acceded to the Beijing Treaty and its not yet in force. Will only come into force following accession/ ratification **by at least 30 member states.**

Legal implications

- Where the Copyright Amendment Bill and the Performers' Protection Amendment Bill (the Bills) contain provisions that are similar or the same as those provided in the Beijing Treaty, the **validity of the provision is not dependent on whether the Treaty is in force or not.**
- Validity of the provisions in the Bills is determined by whether they were enacted in terms of and in line with our Constitution.

NOTABLE PROVISIONS OF THE WIPO TREATIES



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NOTABLE PROVISIONS OF THE BEIJING TREATY

Recognition of rights in the digital environment:

The Beijing Treaty updates the protection of performers at the international level and modernises this protection by recognising performers' rights in the digital environment. It provides a legal basis for the international use of audiovisual productions and safeguards the rights of performers against the unauthorised use of their performances in audiovisual media such as television, film and audio.

Extension of rights in fixed and unfixed performances:

The Beijing Treaty grants performers four kinds of economic rights (being: the right of reproduction; the right of distribution; the right of rental; and the right of making available) for their performances fixed in audiovisual fixations, such as motion pictures. In terms of unfixed (live) performances, the Treaty grants performers three kinds of economic rights, being the right of broadcasting; the right of communication to the public; and the right of fixation (Article 6 to 11).

Moral rights:

The Treaty also grants performers moral rights on live performances and performances fixed in audiovisual fixations. That is the right to claim to be identified as the performer and the right to object to any distortion, mutilation or modification that would be prejudicial to the performer's reputation (Article 5). The intention of granting moral rights is to protect the personality of the performer over and above his or her economic interests.

NOTABLE PROVISIONS OF THE BEIJING TREATY

Transfer of performers' rights:

With regard to the transfer of performers' rights to producers of audiovisual works (Article 12), contracting parties may stipulate in their national laws that once a performer has consented to the audiovisual fixation of a performance, the exclusive rights mentioned above are transferred to the producer of the audiovisual fixation (unless a contract between the performer and producer states otherwise. Alternatively the performer can be granted the right to receive royalties or equitable remuneration for any use of the performance.

Exclusive right to broadcast and communicate publicly or remuneration:

Article 11 grants performers the exclusive right of authorising the broadcasting and communication to the public of their performances in fixed audiovisual fixations. Contracting parties can however in their legislation establish a right to equitable remuneration for the direct and indirect use of performances instead of the right of authorisation.

Circumvention of technological protection measures:

The Beijing Treaty requires contracting parties to ensure that appropriate remedies are put in place against the circumvention of technological protection measures used by performers in connection with the exercise of their rights (Article 15). Adequate protection and remedies should therefore exist against the alteration or removal of electronic rights management information attached to a performance fixed in an audiovisual fixation (Article 16).

NOTABLE PROVISIONS OF THE BEIJING TREATY

National Treatment:

With regard to the exclusive rights specifically granted by the Treaty and the right to equitable remuneration, contracting parties are required to accord protection to audiovisual performers on a national treatment basis. Each contracting party should accord to nationals of other contracting parties the treatment it accords to its own nationals (Article 4). Contracting parties can limit the extent and term of protection accorded to nationals of another contracting party in accordance with what its nationals enjoy in the other contracting party or as per reservations made (Articles 4)

Term of protection and representation at the Assembly:

The Beijing Treaty grants protection to performers for a term of 50 years after the fixation of the audiovisual performance (Article 14). Contracting parties can be represented by one delegate in the Assembly created to deal with matters concerning the maintenance, operation and development of this Treaty (Article 21).

Non-self-executing Treaty:

The Treaty is a non-self-executing Treaty and will not automatically become enforceable in law once Parliament has approved. It will only become enforceable in law through the implementation of domestic legislation. Contracting parties have the obligation to ensure that appropriate provisions exist in their national laws (Article 20).

NOTABLE PROVISIONS OF THE WPPT

Granting of economic rights:

- The WPPT grants performers economic rights (Article 6 to 10) on their fixed or in unfixed (live) performances and moral rights (Article 5) which remain valid beyond the transfer of performers' rights. Producers of phonograms are also granted the same economic rights in their phonograms (Article 11 to 14).

Equitable remuneration:

- The WPPT makes provision for a single equitable remuneration for direct or indirect use of phonograms published for commercial purposes or for communication to the public. Contracting parties may limit or refrain from applying this provision by notifying the Director General of WIPO. (Article 15).

Protection against the circumvention of security measures:

- Effective remedies should be enacted against those who deliberately remove or alter electronic rights-management information without authority and against the related acts of distribution, importation for distribution and communication to the public with knowledge that such information has been removed or altered (Article 19).



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NOTABLE PROVISIONS OF THE WPPT

Moral rights of performers:

- Moral rights are provided under Article 5 for performers in respect of their live aural performances or performances fixed in phonograms (although these rights cover many kinds of modifications, they may be particularly relevant in the case of digital manipulations of performances fixed in phonograms). Moral rights entitle performers to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation. The application of Article 5 can be limited to performances which occurred after the entry into force of the WPPT for that contracting party (Article 22).

Exclusive rights:

- **to authorise making available:** In Articles 10 and 14, the WPPT provides an exclusive right for both performers and producers of phonograms to authorise making available their fixed performances and phonograms, respectively, by wire or wireless means, in an interactive, on-demand manner.
- **to authorise broadcasting and communication to the public:** In accordance with the standards in the Rome Convention, Article 6 of the WPPT provides for the exclusive rights of performers to authorise the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast program, and the fixation of their unfixed performances.
- **of reproduction:** Articles 7 and 11 are also consistent with the Rome Convention and provides an exclusive right of reproduction for performers in respect of their fixed performances and for producers of phonograms.



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NOTABLE PROVISIONS OF THE WPPT

CONT.

Right of distribution and rental:

- Articles 8 and 12 recognise a right of distribution for both performers and producers of phonograms. The WPPT also grants performers and producers an exclusive right of authorising commercial rental of their performances to the public (Article 9 and 13).

Reservations, Limitations or exceptions to rights:

- Except for the remuneration right for broadcasting (Article 15), no reservations are allowed under the WPPT (Article 21). Article 16 of the WPPT provides that limitations or exceptions to rights may be made in certain special cases that do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the interests of the performer or the producer of the phonogram. The same test is established in Article 9(2) of the Berne Convention.

National treatment and formalities for enjoyment of rights:

- The WPPT obliges contracting parties to grant national treatment in respect of the rights provided in the WPPT to nationals of other contracting parties (Article 4), except to the extent that another contracting party makes use of reservations permitted under Article 15 of the WPPT. Enjoyment and exercise of the rights granted in terms of the WPPT must not be subject to any formalities (Article 20).

NOTABLE PROVISIONS OF THE WPPT CONT.

Term of protection:

- A fifty-year term of protection for the rights of both performers and producers of phonograms is provided (Article 17), this is an improvement from the Rome Convention which provides for only a twenty-year term. As provided in Article 22, the WPPT applies to performances that took place and phonograms that were fixed before the date of entry into force of the WPPT, provided that the term of protection has not expired.

Statements of the Diplomatic Conference:

- The WPPT's footnotes contain statements agreed to by the negotiators at the Diplomatic Conference. These statements aid in the interpretation of certain articles. In particular, the agreed statements explain that computer storage of works and phonograms is covered by the WPPT, and that the provisions governing limitations and exceptions provide sufficient flexibility for countries to provide for and extend appropriate limitations on rights when adapting their laws to the digital environment.

Non self-executing treaty:

- The WPPT is a non-self-executing treaty and will not automatically become enforceable in law once Parliament has approved. Domestic legislation is also required to ensure that contracting parties to the WPPT are granted, under South African law, the rights to which they are entitled under the WPPT (Article 23). The Performers' Protection Amendment Bill is currently before Parliament.

NOTABLE PROVISIONS OF THE WCT

Non-self-executing Treaty: The WCT is a non-self-executing Treaty and will not automatically become enforceable in law once Parliament has approved. It will only become enforceable in law through the implementation of domestic legislation (Article 14).

Compliance with the Berne Convention: Article 1 requires that contracting parties comply with the substantive obligations of the Berne Convention. Like the Berne Convention, the WCT provides that contracting parties may not impose formalities on the nationals of other contracting parties as a condition for claiming protection under the WCT (Article 3).

Recognition of rights in the digital environment: The WCT responds to the challenges of protecting works in the realm of digital technology by obliging contracting parties to ensure that rights holders have the exclusive right to control on-demand transmissions of works to members of the public (Article 8).

NOTABLE PROVISIONS OF THE WCT

Obligations concerning Rights Management Information: The WCT obliges contracting parties to provide adequate legal protection against the circumvention of technologically based security measures and to apply appropriate and effective remedies against protection-defeating devices or services (Article 11).

Remedies for deliberate alteration of Rights Management Information: Effective remedies should be provided against the deliberate removal or alteration of electronic rights-management information without authority and against the related acts of distribution, importation for distribution and communication to the public with knowledge that such information has been removed or altered (Article 12).

Protection of computer programs: In Articles 4 and 5, the WCT clarifies that computer programs are protected as literary works under the Berne Convention, and that original compilations of data (databases) that incorporate copyrightable authorship are also protected.

Exclusive post-first-sale right: Article 7 provides for an exclusive post-first-sale right of rental for computer programs, cinematographic works and works embodied in phonograms; contracting parties need not implement the rental right in respect of computer programs where the program itself is not the object of rental, or in the case of cinematographic works where rental does not lead to widespread copying impairing the right of reproduction.



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NOTABLE PROVISIONS OF THE WCT

CONT.

Circumvention of technological protection measures: In addition to the rights recognised by the Berne Convention, the WCT grants authors the right of distribution; the right of rental; and a broader right of communication to the public (Article 6 to 8). Limitations and exceptions can be provided in domestic legislation in line with a three step test and provided that legitimate interests of authors are not unreasonably prejudiced (Article 10). The WCT also obliges contracting parties to provide legal remedies against the circumvention of technological measures (e.g. encryption) and against unauthorised modification rights management information necessary for licensing, collecting and distribution of their royalties (Article 11 to 12).

Limitations or exceptions: In Article 10, the WCT extends the application of the three-step test for exceptions established for the right of reproduction in Article 9(2) of the Berne Convention to all other rights and provides for the possible limitations or exceptions to all rights in certain special cases: Provided that this is not in conflict with a normal exploitation of the work and does not unreasonably prejudice the interests of the author.

Rights and obligations under the WCT: In order to ensure that a contracting party to the WCT has recourse in the event of a dispute or non-compliance with obligations by a contracting party that is an intergovernmental organisation or a member state of such an organisation, the WCT provides that each contracting party bears all the obligations under the treaty (Article 18).

No reservations: Reservations are not allowed for any of the obligations in the WCT (Article 22).

CONSISTENCY WITH DOMESTIC AND INTERNATIONAL LAW



the doj & cd has analysed the WIPO Treaties in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa and with reference to Chapter 5 of the Constitutional Handbook for Members of the Executive.*

DIRCO scrutinised the WCT in terms of international law and South Africa's international obligations.

The three WIPO Treaties were found to be consistent with domestic law; international law and South Africa's international obligations.

ALIGNMENT OF THE WIPO TREATIES WITH THE NDP



- Strategically aligned with the priorities outlined in the National Development Plan specifically **Chapter 15, page 473** which recognises that the creative sector should be supported by government and by the private sector as a sector that has great potential for growth and job creation over and above its role of facilitating dialogue for nation building.

IMPLICATIONS OF ACCEDING TO THE WIPO COPYRIGHT TREATIES



Organisational and personnel implications-

None



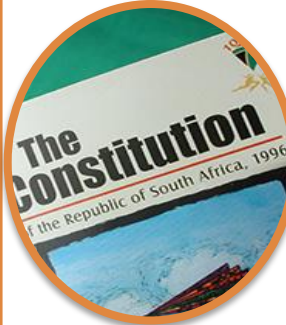
Financial implications-

South Africa is already a member of WIPO and pays annual member fees. As a contracting state to the Treaties, South Africa will also bear the expenses of the delegates attending the assemblies constituted to deal with matters concerning the operation, application, development and maintenance of the Treaties.



Communication implications-

A communication strategy will be developed in consultation with key government departments.



Constitutional implications-

Acceding to the Treaties will not require amendments to our constitution but incorporates rights for performers, producers and authors of copyright works which enhances intellectual property rights.



Implications for vulnerable groups-

Acceding to the Treaties benefits South Africa's creative industry. These benefits will flow as a result of the increased protection in other countries ratifying or acceding to the Treaties.



Security implications-

None

UPDATE ON THE MARRAKESH TREATY



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BACKGROUND OF THE MARRAKESH TREATY

The Marrakesh Treaty was signed in June 2013, and came into force on 30 September 2016. **To Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled**

The Treaty has a clear **humanitarian focus** and its main goal is to create a set of **mandatory limitations and exceptions** for the benefit of the blind, visually impaired and otherwise print disabled (beneficiaries).

The Treaty requires member states to introduce a **standard set of limitations and exceptions to copyright rules** in order to permit the **reproduction, distribution and making available of published works in formats that are accessible to beneficiaries**. It also requires state to permit the exchange of these published works across borders by organisations that serve those beneficiaries.

Cross-border transfer is not permitted unless the Contracting Party in which the copy is made is a party to the WIPO Copyright Treaty or otherwise applies the three-step test (provided in the Berne Convention) to limitations and exceptions implementing the Marrakesh Treaty.

PROGRESS AND WAY FORWARD ON MARRAKESH TREATY

Legal Opinions

- Legal opinions on the Marrakesh Treaty were received from DOJ & CD and DIRCO on 17 May 2008 and 26 June 2018 respectively.
- The DOJ & CD is of the view that the Marrakesh Treaty should only be acceded to once the Copyright Amendment Bill gets passed into law and provided that it is passed with the provisions giving effect to the provisions of the Marrakesh Treaty.
- DOJ & CD is concerned that if there is resistance to the Copyright Amendment Bill with regard to provisions relating to Marrakesh Treaty, South Africa would be bound by its international commitments to the disadvantage of domestic obligations.
- DIRCO has also conformed with DOJ and CD's legal opinion and requested to be furnished with confirmation that South African Law is compliance with the Treaty prior to facilitating accession.

Way Forward

- On finalisation of the Copyright Amendment Bill, the process to accede to the Marrakesh Treaty will be resuscitated.



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CONCLUSION

A review of the **40 year old copyright legislative framework** is necessary to enable a **balanced** legislative regime cognisant of the **interests of all stakeholders including owners; consumers and investors**. The same principle about the review applies to the Performers' Protection Amendment Bill which is more than 50 years.

To achieve this balance South Africa's **developmental agenda; socio-economic needs and international developments** are considered.

Accession to the WIPO Treaties will ensure that:

the law keeps pace with technological developments;

Protection for rights holders in the digital environment;

Recognition of new technological methods of exploiting copyright works;

Strengthening of the position of performers; producers and authors in local and other markets; and

Access to copyright works specifically by those most vulnerable.

RECOMMENDATION



The Select Committee is requested to approve accession to the:

1. Beijing Treaty on Audiovisual Performances (Beijing Treaty);
2. WIPO Performances and Phonographs Treaty (WPPT); and
3. WIPO Copyright Treaty (WCT).

THANK YOU



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